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No. 93-1318

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

INTERSTATE COMMERCE COMMISSION,
Petitioner,
v.
TRANSCON LINES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE LLOYD T. WHITAKER AS TRUSTEE FOR THE ESTATE OF OLYMPIA HOLDING CORPORATION f/k/a P*I*E NATIONWIDE, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae Lloyd T. Whitaker, trustee for the estate of Olympia Holding Corporation f/k/a P*I*E Nationwide, Inc. ("*Amicus*" or "Trustee"), files this brief in support of respondents Transcon Lines, *et al.*[1] P*I*E Nationwide, Inc. ("P*I*E*") was a motor common carrier operating pursuant to authority of the Interstate Commerce Com-

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[1] All parties have consented to the filing of this Brief pursuant to Rule 37.3 of the Rules of this Court. The parties' letters are filed with the Clerk of the Court.

mission ("ICC"). P*I*E filed a Chapter 11 petition under the Bankruptcy Code on October 16, 1990. Its motor carrier operations continued, however, first as a debtor-in-possession and then under the auspices of *Amicus* Lloyd T. Whitaker, appointed Chapter 11 trustee on December 26, 1990. The case was converted to Chapter 7 on March 11, 1991, and *Amicus* was appointed Chapter 7 trustee.

As with most bankrupt motor carriers, the principal asset of P*I*E's estate is its accounts receivable. The receivables consist of "undercharge" claims against former shipper-customers of P*I*E to collect the difference between transportation charges the motor carrier originally billed (and the shipper paid) based on rates not contained in duly filed tariffs and the higher charges the Trustee now properly calculates based on the carrier's applicable filed tariff rate. The estate's receivables also consist of "original charge" claims against former shipper-customers. These claims arise when the shipper fails or refuses to pay all or any portion of the original transportation charges due and owing pursuant to the carrier's original freight bill, correctly calculated on the basis of rates assessed according to the carrier's duly filed tariffs.

"Original charge" claims include suits to collect undiscounted transportation charges resulting from application of the carrier's loss-of-discount tariff provisions for late payment. P*I*E's Trustee has filed such "original charge" claims pursuant to P*I*E's own loss-of-discount tariff provision, similar (but not identical) to the provision the ICC seeks to enjoin the Transcon Lines ("Transcon") trustee from enforcing. The Trustee estimates the P*I*E estate has brought 2200 adversary proceedings in the bankruptcy court to collect original charge claims predicated on the failure of shipper-defendants to pay transportation charges within the time frame specified in P*I*E's duly filed tariffs.[2]

[2] The main bankruptcy cases are jointly administered in Case Nos. 90-4195-BKC-3P7 and 90-4223-BKC-3P7 in *In re Olympia Holding Corporation a/k/a P*I*E Nationwide, Inc., et al.*, pending in the U.S. Bankruptcy Court in the Middle District of Florida, Jacksonville Division. One very important loss-of-discount claim of the Trustee, brought outside the bankruptcy court in the name of P*I*E's principal secured creditor, is pending before the U.S. District Court for the Middle District of Florida, Jacksonville Division, in Case No. 91-953-Civ-J-16, *Fidelcor Business Credit Corp.* v. *Dillard Department Stores ("Dillard")*. *See amici* Health and Personal Care Br. at 23, n.8.

Because most shipper-defendants have asserted P*I*E's alleged failure to comply with ICC credit regulations as a defense to the Trustee's suits to collect the loss-of-discount tariff rate, *Amicus* wishes to present his views to assist this Court in resolving the proper application of the filed rate doctrine to the ICC's credit regulations and its liquidated-damages regulation.

STATEMENT

The Trustee adopts the counterstatement of the case appearing in the brief of respondents, Transcon Lines, *et al.* beginning at page 2. The Trustee does not believe the context in which the loss-of-discount tariff issue arose in *ICC* v. *Transcon Lines*, 990 F.2d 1503 (9th Cir. 1992), *on remand* 9 F.3d 64 (1993), now before this Court, is fairly representative of the different types of loss-of-discount claims in bankruptcy cases. The Trustee offers the following description of the loss-of-discount claims he is pursuing in the P*I*E bankruptcy case to provide a broader perspective within which to evaluate the legal issues presented. Their resolution here will have far-reaching effect on the Trustee's pending late-pay claims proceedings.

1. *P*I*E Discount Tariff.* P*I*E published, effective October 22, 1990, a loss-of-discount tariff provision in its tariff on file at the ICC, ICC Tariff PIEC 107-J, Item 721:

> 1. [D]iscounts . . . shall apply only when tariff charges are paid within a maximum period of sixty (60) calendar days from invoice date.

2. The provisions of this rule do not change in any way the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with I.C.C. regulations, 49 CFR 1320. This rule simply establishes a condition precedent for the application of the special tariff provisions described in Paragraph 1.

Except for the length of time given shippers to pay in order to receive their discount, it is virtually identical to Transcon's.

Like Transcon's tariff, P*I*E's loss-of-discount tariff item adopted as P*I*E's credit term the obligation of all shippers participating in the discount program to pay within the ICC's standard credit period, 15 days from date of delivery. Like Transcon's tariff, P*I*E's tariff item established an express condition precedent to receiving the discount: the shippers must make full payment of the discounted transportation charges within a specified number of days after the invoice date—60 days in P*I*E's case, 90 days in Transcon's—in order to be eligible to receive the discount.[3] Like Transcon's tariff, P*I*E's loss-of-discount tariff item was duly filed with the ICC, fully complied with the ICC's credit regulations and liquidated-damages regulation, and was never suspended, investigated, or canceled by the ICC.

2. *Application of the P*I*E Tariff.* From October 22, 1990 until P*I*E terminated all motor carrier operations at the end of December, 1990, thousands of P*I*E's customers shipped their freight as participants in the P*I*E discount pricing program, subject to the loss-of-discount penalty provision. During this period, P*I*E scrupulously

[3] The discount is available even to those shippers not paying within the standard credit period of 15 days as long as they pay within the 60-day or 90-day period prescribed in P*I*E's or Transcon's valid tariff.

administered the terms of its discount tariff and the ICC's liquidated-damages regulation. Unlike Transcon, P*I*E imprinted all of its original freight bills (invoices) with the notation: "FULL CLASS RATES WILL APPLY IF PAYMENT NOT RECEIVED IN 60 DAYS." The majority of the shippers paid the discounted transportation charges within 60 days of the original invoice date, if not within the standard credit period. Unlike Transcon, P*I*E timely rebilled all those that did not pay within 60 days,[4] removing their discounts and rerating their shipments at full class rates. Many of these delinquent shippers paid the rerated freight bills in accordance with P*I*E's loss-of-discount tariff provision. The Trustee has pursued all 2200 former customers that did not pay, filing adversary proceedings in bankruptcy court to collect the full class rates.[5] Virtually all the shipper-defendants in

[4] The only known exception was Dillard Department Stores. *See supra*, at 2, n.2 and discussion *infra*.

[5] While the ICC is not currently a party to any of these adversary proceedings, the ICC has been actively involved in the P*I*E bankruptcy case for the express purpose of obstructing the Trustee's collection efforts. For example, the agency's General Counsel is aiding shippers' collective defense strategies through his membership on the Shippers Defense Group Steering Committee, an *ad hoc* coterie of counsel volunteering to coordinate defense efforts in hundreds of the Trustee's cases the district court has now withdrawn from the P*I*E bankruptcy court case. It initiated an agency "show cause" proceeding against the Trustee in ICC Docket No. 40785 designed to halt his collection of certain types of undercharge claims. The bankruptcy court enjoined the continuation of that proceeding in *Whitaker* v. *ICC*, Adv. No. 92-2747 (Bankr. M.D. Fla. June 8, 1992), *aff'd* 161 B.R. 524 (M.D. Fla. 1993). It issued a blanket rule purportedly applicable to all trustees prohibiting the collection of any undercharge claim or loss-of-discount claim without first obtaining ICC permission. Ex Parte No. MC-208, *Nonoperating Motor Carriers—Collection of Undercharges*, 8 I.C.C. 2d 742 (1992). The Third Circuit, at the request of the Trustee and others, set aside the ICC rule "as in excess of statutory authority." *White* v. *United States*, 989 F.2d 643 (3rd Cir. 1993).

pending adversary proceedings are searching for technical violations of the ICC's liquidated-damages regulation, 49 C.F.R. § 1320.2(g), as the means to avoid their obligations to comply with P*I*E's loss-of-discount tariff.

3. *Dillard Is A Special Case.* *Dillard* represents a unique case for P*I*E. The defendant in that case, Dillard Department Stores ("Dillard"), is a member of one or more of the large-shipper organizations supporting the ICC as *amici* in this proceeding. On November 7, 1990, P*I*E had an extraordinarily deep discount published for Dillard's account, a 57 percent discount from the applicable class rate, but made it subject to Item 721, the loss-of-discount liquidated-damages provision of P*I*E's tariff, PIEC 107. Over a two-month period, Dillard ran up a bill of $508,939 in so-called Item 721 discounted freight charges, while refusing to pay any portion of it.[6] Dillard officials had made the corporate decision to continue using P*I*E motor carrier services without paying a dime for them.[7] Dillard had actual knowledge of the loss-of-discount provision, specifically requesting and receiving a copy of that published tariff item from P*I*E. As Dillard's delinquency reached 60 days, P*I*E began rerating each of Dillard's past-due freight bills, but at the private request of Dillard, agreed not to post them immediately. Without notifying the ICC, Dillard persuaded P*I*E not to mail the rerated bills to Dillard, ostensibly to allow Dillard representatives time to negotiate a settlement of the amount due. When negotiations broke down after several months, P*I*E mailed the rerated bills, albeit in many instances a month or more after expiration of the 90-day period specified in the ICC's liquidated-damages

[6] During this two-month period, P*I*E operated under the protection of Chapter 11 of the Bankruptcy Code.

[7] Dillard contends its corporate actions were in retaliation for receiving a check from P*I*E in the amount of $14,000 which, when presented to the bank for payment, was returned for insufficient funds.

regulation, 49 C.F.R. § 1320.2(g)(2)(iv).[8] Dillard still refused to pay any portion of the bill—either the original charges or the loss-of-discount penalty. The lawsuit followed, brought in the name of P*I*E's principal secured creditor, Fidelcor Business Credit Corp. ("Fidelcor"). *See supra* at 2, n.2. Despite the non-compliance defenses raised by the P*I*E Trustee's shipper-defendants, the Trustee is unaware of any other instance in which P*I*E failed to comply with any aspect of the ICC's liquidated-damages regulation in the process of enforcing its loss-of-discount tariff item.

4. *ICC Role.* Dillard and hundreds of other shipper-defendants have complained that P*I*E failed to comply with each and every double-notice, double-mailing time provision technically required under 49 C.F.R. § 1320.2(g)(2). But such technical violations, if any, are simply not of the same magnitude of wrong as Dillard's obstinate (and admitted) refusal to pay the original transportation charges it owes P*I*E, a lapse the ICC has allowed to go unpunished. In April 1993, Fidelcor, P*I*E's principal secured creditor, complained to the ICC in formal pleadings about Dillard's adamant refusal to pay the uncontested original transportation charges of more than $500,000. Fidelcor asked the ICC to institute civil or criminal action against Dillard under the Elkins Act, 49 U.S.C. § 11903(a), for its felonious conduct.[9] Instead, the ICC has merely winked at Dillard's blatant misconduct, a violation of not only the Elkins Act, but also the ICC's own so-called credit regulations. The ICC has taken no action to date, failing even to acknowledge Fidelcor's complaint on behalf of the P*I*E estate.

[8] The number of instances remains in dispute between the parties.

[9] This request came in response to Dillard's own complaint filed with the ICC seeking a ruling to stymie Fidelcor's efforts to collect P*I*E's loss-of-discount penalty from Dillard because of alleged credit-rule violations. *See supra* at 2, n.2, and *amici* Health and Personal Care Br. at 23, n.8.

SUMMARY OF ARGUMENT

1. The ICC correctly observes that shippers can not assert the carrier's violation of the credit regulations as a defense to the collection of the filed rate, including one mandating loss of discount for late payment. ICC Br. at 5, 20. The Trustee agrees and urges the Court to reaffirm this proposition as announced in *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 349 (1982) ("*Commercial Metals*"). Significantly, the ICC's shipper *amici* do not dispute this statement of legal principle.

2. The Trustee does not, however, agree the ICC has statutory authority to enjoin trustees from collecting duly-filed tariff rates, including their loss-of-discount provisions, under the guise of enforcing ICC credit regulations. No such authority is set forth in 49 U.S.C. § 10743(b), the claimed statutory basis for the ICC's credit regulations, or elsewhere. To grant the ICC the injunction it seeks would be to graft an exception onto the filed rate doctrine. No express statutory basis exists for such an exception. Allowing the ICC to declare the loss-of-discount penalty uncollectible, leaving the carrier free to collect only its discount rate, truncates the terms of a duly filed tariff; it bars the carrier from enforcing the tariff's loss-of-discount condition. The filed rate doctrine prohibits such piecemeal construction.

3. The discriminatory attributes of the liquidated-damages regulation of the ICC, 49 C.F.R. § 1320.2(g), are fundamentally in conflict with the statutory restriction prohibiting discriminatory credit regulation in 49 U.S.C. § 10743(b). Since the alleged source of the ICC's power to adopt section 1320.2 is 49 U.S.C. § 10743(b), its adoption is an *ultra vires* act. Section 1320.2(g) imposes highly technical post-delivery requirements on the motor carriers as conditions to collecting their filed rate penalties. These conditions are within the discretionary control of the carriers to satisfy or not satisfy as they see fit, depending upon whether they wish to favor one delinquent shipper over another. As Fidelcor's claim against Dillard illustrates, even the failure to meet a single billing deadline or to include a single disclosure phrase on the invoice creates an opening for the ICC to block collection of the filed-rate penalty and for the shipper to refuse to pay the tariff charges, the full undiscounted rates. The Ninth Circuit quite properly applied the filed rate doctrine to foreclose these possible abuses.

4. The filed-rate doctrine, as interpreted and applied in this Court's decisions in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) ("*Maislin*"), and its progeny, forecloses the ICC from enforcing the liquidated-damages regulation through court injunction so as to override the carrier's obligation to collect the filed rate published in a tariff that fully complies with that regulation. Neither does *Maislin* lend support to the argument the ICC and the shipper *amici* advance that the dollar component of the discounted rate constitutes a separate, self-contained filed rate and therefore Transcon's trustee commits an "unreasonable practice" under 49 U.S.C. § 10701 when he attempts to collect the higher undiscounted rate. The actual dollar amount of the discounted rate standing alone is not a filed rate. Rather, an integral term of the "rate" is that a lower dollar amount applies if and only if the transportation charge is paid within a specified period of time. If that period passes without payment, enforcement of the filed rate doctrine requires collection of the higher, undiscounted dollar amount.

ARGUMENT

I. AUTHORITY TO PUBLISH LOSS-OF-DISCOUNT TARIFFS IS NOT DERIVED FROM ICC'S CREDIT REGULATIONS.

The ICC urges this Court to expand its holding in *Reiter* v. *Cooper*, —— U.S. ——, 113 S.Ct. 1213 (1993), to recognize an exception to the filed rate doctrine, purporting to rely on the ICC's alleged "express statutory authority to obtain an injunction to enforce the Act and the credit regulations." ICC Br. at 17. *See also* ICC Br. at 19 ("The ICC's action enforces regulations that are authorized by the specific statutory prohibition against credit transactions except in accordance with ICC rules, 49 U.S.C. 10743."). This argument must fail not only because no such express authority exists, but also because the statutory provision the ICC seeks to enforce, 49 U.S.C. § 10743(b), is not the source of the liquidated-damage regulation the ICC claims Transcon violated.

49 U.S.C. § 10743(b) authorizes motor carriers to relinquish shipments to consignees without first receiving payment if the carriers comply with ICC relinquishment regulations "governing payment for transportation and services . . . ." Historically, the ICC and Congress have labeled the agency's rules allowing carriers to provide shippers a period of time within which to pay transportation charges as "credit extension regulations." The credit extension regulations of the ICC, now codified at 49 C.F.R. § 1320.2, have four operative components.

First, the regulation permits carriers to extend credit to shippers for a period of 15 days without any tariff filing or other notice (§ 1320.2(c)), but only after the carriers take reasonable steps to ensure the shippers pay within this credit period (§ 1320.2(a)(2) and (a)(3)(ii)(C)). This 15-day "standard credit period" is precisely the credit term Transcon (and P*I*E) elected to impose as the basis for relinquishing possession of freight

before receiving payment of discounted transportation charges. They published this credit term in their respective discount tariffs on file at the ICC even though they were not required to do so. *See* ICC Br. at 6-7, n.7; and *supra* at 3-4. Neither the ICC nor its shipper *amici* contend Transcon violated this credit regulation.

Second, the ICC's credit regulations permit carriers to extend credit to shippers for an additional 15 days beyond the 15-day standard credit period, a total of 30 days, if they do so pursuant to tariff publication (§ 1320.2(d)). Third, the credit regulations authorize carriers to assess by tariff publication "service charges" for extending credit beyond the initial 15-day standard credit period (§ 1320.2(e)(2)) and even beyond the credit period authorized in their tariffs (§ 1320.2(e)(3)). The service charges are the means by which carriers may offset their costs associated with allowing shippers the use of funds during and after the authorized credit period. Transcon (and P*I*E) elected not to extend any credit beyond the initial standard 15-day credit period and not to assess any service charges for extending credit. *See* ICC Br. at 6-7, n.7. Neither the ICC nor its *amici* charge Transcon with violating either of these credit regulations.

Last, the ICC credit regulations authorize motor carriers to publish tariff provisions rewarding shippers with discounts if they pay prior to the end of the carriers' credit periods (§ 1320.2(f)). Transcon (and P*I*E) elected not to publish any early-payment incentives and are not accused of violating this credit regulation.

Even though Transcon is not charged with violating any of the four credit-regulation components, the ICC contends it is nevertheless entitled to an injunction blocking Transcon from collecting its duly filed legal rates because Transcon did not comply with 49 CFR § 1320.2(g). Section 1320.2(g) is not a credit regulation, but a regulation authorizing carriers to recover liquidated damages, pursuant to tariff publication or bill-of-lading inser-

tion, from shippers for failing to pay on time. The liquidated damages are intended to make carriers whole for all their reasonable collection costs. *See* § 1320.2(g)(1). This liquidated-damages regulation has nothing to do with fixing the conditions under which carriers may extend credit to shippers. (Those are found in the preceding subsections (a)-(f) of section 1320.2.) Rather, the liquidated-damages regulation governs the form and timing of the rerated bills the carriers' representatives send out when the terms of the credit period and the additional payment period, extended by tariff, have expired. While the ICC has elected to codify its liquidated-damages regulation as an adjunct to its extension-of-credit regulations, it is not a credit regulation, and the ICC's power to authorize carriers to recover liquidated damages from it is not derived from 49 U.S.C. § 10743(b) at all, but from the more general powers Congress gave the ICC to regulate tariff content, such as those found in 49 U.S.C. § 10762 (a).[10] The Court in *Maislin* held that section 10762(a) is the statutory core of the filed rate doctrine, not a source for creating exceptions to it.

The ICC does not claim it may seek to enjoin the collection of the filed rate in response to a violation of *any* regulation, but only one tied to the credit-extension provisions of 49 U.S.C. § 10743(b).[11] The ICC's position rests principally on this Court's observation in *Commercial Metals* that the ICC has the "power to seek a federal court injunction requiring a carrier to comply with the [ICC's credit] regulations." ICC Br. at 2, 5, 11. But Transcon *has* complied with the ICC's credit regulations;

[10] Moreover, the ICC informally recognized the right of motor carirers to publish loss-of-discount tariff provisions even prior to the date the ICC approved its liquidated-damages regulation. *See Payment of Rates & Charges—Penalty For Nonpayment*, 4 I.C.C.2d 340, 345, n.5.

[11] "The ICC brought this action in district court to enjoin respondents from applying Transcon's loss-of-discount provisions to shippers in violation of the ICC's credit regulations." ICC Br. at 7.

the ICC does not allege Transcon has violated any of the four basic components of the conditions the ICC has imposed—found in subsections (a) through (f) of section 1320.2—on extension of credit. In contrast, in *Commercial Metals* this Court found that Southern Pacific had not complied with the ICC's credit regulations. It had not taken reasonable steps to assure itself the consignee was willing and able to pay the transportation charges within the credit period before relinquishing possession of the freight. The ICC readily recognizes the dichotomy between credit-extension regulations of the type Southern Pacific violated and the liquidated-damages regulation at issue here, but inxeplicably elects to treat them as if they were one and the same or at least as if they emanated from the same statutory source, 49 U.S.C. § 10743(b). ICC Br. at 14.[12] They are not the same, and they do not derive from the same statutory section, despite the ICC's assertion to the contrary.

Section 10743(b) authorizes the ICC to issue only credit extension regulations and only if those regulations prevent discrimination. Not only does the ICC's liquidated-damages regulation impose no conditions for extending credit, but it is also laden with conditions conducive to secret post-delivery discrimination. By deliberately planting a mine-field of time-sensitive collection conditions throughout 49 CFR § 1320.2(g)(2), all placed within the control of carriers, the ICC openly invites carriers to discriminate in favor of particular shippers.[13] By mistake

[12] "Invoking that statutory authority [of 49 U.S.C. § 10743(b)], the ICC has promulgated detailed regulations that govern when a carrier may release goods without payment *and* when it may collect liquidated damages, as compensation for collection expenses . . . . The Commission's regulations, 49 C.F.R. Pt. 1320, contain a variety of requirements that carriers must fulfill to collect liquidated damages." ICC Br. at 14. (Emphasis added.)

[13] For instance, the carrier need only aggregate the balance-due bills, omit certain credit or penalty disclosure phrases on the freight bill, or wait 91 days to mail out revised freight bills in order to

or otherwise, a carrier may, with the secret support or at the insistence of its customer, exploit a technical "credit" violation to allow a class of favored delinquent shippers to retain its full discount while compelling another class of similarly situated shippers to forego its discount—even when both classes pay the charges precisely the name number of days after delivery. As discussed *infra*, discrimination is not merely a hypothetical possibility or a matter of speculation. That agency regulation violates the antidiscrimination mandate of 49 U.S.C. § 10763(b), as well as the essential objective of the filed rate doctrine, to prevent price discrimination. *Maislin*, 497 U.S. at 126.

Unlike the tariff in *Security Services, Inc.* v. *Kmart Corp.*, 62 U.S.L.W. 4329 (May 16, 1994), the filed rate of Transcon, with its loss-of-discount condition, is and remains the duly filed, effective tariff rate irrespective of any regulation violation, and the ICC does not contend otherwise. Significantly, the vast majority of the thousands of shippers P*I*E served pursuant to P*I*E's own loss-of-discount tariff retained full discounts by paying within the allotted 60 days. Most of the shippers that refused or failed to pay on time lost their discounts, reluctantly paying the undiscounted amount once they were rebilled the full class rates, without the necessity of the Trustee filing a lawsuit.

II. THE ICC'S LIQUIDATED-DAMAGES REGULATION FOSTERS DISCRIMINATION IN THEORY AND IN FACT AND IS, THEREFORE, CONTRARY TO LAW.

The ICC brushes off as pure speculation the Ninth Circuit's rationale for upholding the supremacy of the filed rate doctrine over the ICC's so-called credit regulations, ICC Br. at 21, and now urges this Court to allow the

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justify under § 1320.2(g) giving the full discount to non-paying or delinquent favored shippers despite the carrier's published tariff provision requiring full payment within 90 days (or 60 days) in order to be entitled to that discount.

ICC to enjoin carriers from collecting their filed rates (the loss-of-discount penalty) because of credit-regulation violations, yet reaffirm the shippers' inability to rely on these same violations as defenses or counterclaims when sued to collect the same filed rate penalty. The Ninth Circuit refused to embrace this anomalous result because,

> . . . [it] would permit an end-run around the filed rate doctrine. A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would puposely violate various credit regulations such as 49 C.F.R. 1320.3(c), which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only after a carrier goes bankrupt would the illegal discount be brought to light.

3 F.2d at 66-67. The ICC simply dismisses the Court's "speculation" that the ICC would "wink" at the above conduct as an inappropriate basis for holding that the filed rate doctrine trumps the ICC's credit regulations. ICC Br. at 21.

The Court of Appeals was entitled—even obligated—to consider these possibilities when faced with a government request for a blanket injunction, one neither predicated on a single case or controversy nor dependent on the peculiar facts of any specific loss-of-discount claim. Congress deliberately designed the filed rate doctrine to eliminate these possibilities. The doctrine brooks no exceptions under any pretext, including ignorance or intentional misquoting of rates. *Maislin*, 497 U.S. at 127, quoting from *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915). Accordingly, the very real fear of *potential* carrier rate manipulators misquoting rates to favor privileged large shippers led the ICC to insist on strict adherence to the filed rate in *A. J. Poor Grain Co.* v. *Chi-*

cago, B. & O. Ry. Co., 12 I.C.C. 418, 421-22 (1907), quoted with approval in *Maislin*, 497 U.S. at 128, and led this Court to strike down the ICC's negotiated rates policy in *Maislin*.

That the liquidated-damages regulation *promotes* discrimination provides further grounds for the conclusion that its statutory basis can not be found in 49 U.S.C. § 10743(b), the statutory basis for credit regulations. That statutory provision authorizes carriers to extend credit "[u]nder regulations . . . *preventing discrimination* . . . ." (Emphasis added.) Since the liquidated-damages regulation fails to prevent discrimination—in fact, it encourages discrimination—it is contrary to the terms of the statute itself and therefore is an *ultra vires* rule this Court should refuse to enforce in this proceeding. *See e.g., Insurance Company of North America* v. *Gee*, 702 F.2d 411, 414 (2nd Cir. 1983) (holding that regulation inconsistent with authorizing statute is unenforceable: "Regulations promulgated pursuant to rulemaking authority conferred by statute assume the force of law only to the extent consistent with the statutory scheme they were designed to implement."), *citing Pearce* v. *Director, Office of Workers' Compensation Programs*, 647 F.2d 716, 726 (7th Cir. 1981). *See also, e.g., Meade Township* v. *Andrus*, 695 F.2d 1006, 1009-10 (6th Cir. 1982) (holding that regulation inconsistent with governing statute is void: "We could not uphold the regulation in its present form without violating the fundamental principle that all provisions of a statute must be given full effect."), *citing American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 513 (1981), and *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

The P*I*E proceedings, and in particular Fidelcor's suit against Dillard, illustrate that the Ninth Circuit did not engage in idle speculation in raising the spector of discrimination. In fact, the suit against Dillard makes clear just how readily and unfairly the liquidated-damages

regulation can be manipulated to discirminate among shippers of differing economic clout. Ironically, the larger the delinquent amount, the greater the clout.

As explained *supra* at 6-7, Dillard has refused to pay even one penny of the more than $500,000 owed on the original freight charges it accumulated under P*I*E's loss-of-discount tariff. Under the guise of negotiating a settlement of this claim, it persuaded P*I*E to delay sending out the hundreds of re-rated freight bills deleting the discounts until after the 90-day period fixed in 49 C.F.R. § 1320.2(g)(2) for rebilling had passed. Despite actual knowledge of P*I*E's loss-of-discount tariff provision, furnished well before the expiration of the 90-day rebilling deadline, Dillard refused and still refuses to pay anything, brazenly exploiting P*I*E's technical non-compliance with § 1320.2(g)(2), a condition Dillard itself earlier induced.

The discrimination scenario is self-evident; large shippers such as Dillard electing not to pay on time can still receive their discounts if they strike a secret post-delivery deal under which the carrier violates a technical requirement of the liquidated-damages regulation, while less favored delinquent shippers must pay the late-payment penalty in compliance with the carrier's loss-of-discount tariff. Moreover, 3½ years after P*I*E transported Dillard's merchandise, Dillard has yet to pay one red cent, but still claims it is entitled to pay the same discount rate as shippers paying within 15 days of delivery and participating in the same loss-of-discount tariff as Dillard. The tariff provision the Trustee (and Transcon's trustee) seeks to enforce in accordance with its terms prohibits this inequity. Congress intended the filed rate doctrine to do no less.

After more than one year, it may yet be too early to brand the ICC's refusal or failure to take any action to punish Dillard as "winking" at Dillard's misconduct. But, given the passage of time and the position the ICC advocates in the Transcon proceeding, the possibility the

ICC will "go along" with Dillard or at least "look the other way" becomes quite real, unless this Court affirms the decision of the Ninth Circuit.

III. TWO FILED RATES IS A MYTH.

The ICC seeks to bifurcate Transcon's discount tariff, which imposes receipt of payment within 90 days as an absolute condition to receiving the discount, into two distinct parts, treating each part as a separate tariff publishing a separate set of rates. ICC Br. at 12, 17, 26, n.22, 27. This exercise permits the ICC and its shipper *amici* to pretend they ask not that the Court block Transcon from collecting its filed rate, but simply that Transcon collect only its "discount rate" instead of its "full class rate." It is from this brittle stalk that the ICC tries to hang its argument that *Maislin* does not govern Transcon's case and the injunction it seeks does not interfere with enforcement of the filed rate doctrine. *See* ICC Br. at 12, 26-27. *See also* Health and Personal Care Br. at 8-9, 15-17. But neither common sense nor years of interpreting the filed rate doctrine permit the ICC to proffer such a limited definition of the term "rate." A "rate" is not a bare dollar amount. Rather, a "rate" consists of all of the terms which together establish a transportation charge. Transcon's discount pricing program offered its customers one rate, a discount from class rates, but only on the condition they pay within 90 days of invoicing.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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